

ESTTA Tracking number: **ESTTA246592**

Filing date: **11/03/2008**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92046037
Party	Defendant NOVATECH SA
Correspondence Address	JOHN S. EGBERT EGBERT LAW OFFICES 412 MAIN STREET, 7TH FLOOR HOUSTON, TX 77002 UNITED STATES
Submission	Opposition/Response to Motion
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Signature	/1811-71/
Date	11/03/2008
Attachments	1811-71 Response to Motion for Sanctions.pdf (14 pages)(189042 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Trademark Registration No. 3,093,389
Registered on: May 16, 2006

BRYAN CORPORATION,	§	
	§	
Petitioner,	§	
	§	
v.	§	Cancellation No. 92046037
	§	
NOVATECH SA,	§	
	§	
Registrant.	§	

REGISTRANT'S RESPONSE TO PETITIONER'S MOTION FOR SANCTIONS

NOVATECH SA ("Registrant"), has moved under Rule 2.127 of the Trademark Rules of Practice and Federal Rule of Civil Procedure 56 for summary judgment and dismissal of BRYAN CORPORATION's ("Petitioner") Petition to Cancel Registrant's trademark registration No. 3,093,389 for the mark STERITALC. Registrant now responds to Petitioner's Motion for Sanctions pursuant to 37 CFR § 2.120(g) and TBMP § 527.01(a), filed on October 14, 2008.

FACTS

1. The Board issued an Order on Petitioner's Rule 56(f) Motion for discovery on August 29, 2008, ordering Registrant to supplement its answer to the fifth interrogatory in Petitioner's Second Set of Interrogatories. *See* [August 29, 2008 Order]. Registrant timely complied with the Board's Order on September 15, 2008 when it served its Supplemental Answers to Petitioner's Second Set of Interrogatories to Petitioner. *See* [Ex. F to Petitioner's Motion for Sanctions]. In accordance with the Board's Order, Registrant submitted an unequivocal answer of "yes" to the interrogatory. Indeed, the Board explicitly explained that "serving a supplemental response which, like the last one, questions the basis or substance of the interrogatory or refuses to answer the

question posed is not permitted and will be grounds upon which petitioner may file a motion for sanctions." *See* [August 29, 2008 Order, p.8].

2. The Board further explained, however, that "[b]y the same token, once respondent complies with this order, petitioner may not seek to further delay responding to the motion for summary judgment, and any attempt to do so will be at its peril. In the event petitioner intends to do anything other than respond to the motion for summary judgment within the time provided, it must initiate a telephone conference with respondent and the Board to discuss its intention, well prior to the deadline for responding to respondent's motion for summary judgment." *Id.*

3. While Petitioner timely filed its Response in Opposition to Novatech SA's Motion for Summary Judgment on October 14, 2008, the required response was made while concurrently filing a Motion for Sanctions, the only possible motion that the Board's Order allowed Petitioner to file without having to initiate a telephone conference with Registrant and the Board to discuss its intentions. *See id.*

DISCUSSION

4. Registrant first submits that, contrary to Petitioner's statement in paragraph 1 of its Motion for Sanctions, Registrant's position has consistently been that the claims of Petitioner, including the alleged fraud, "turn on" whether Petitioner has the standing to bring the present cancellation proceeding. *See* [Answer to Pet. for Cancellation, Second Affirmative Defense, ¶ 22]. Furthermore, Registrant has consistently argued that regardless of standing, Petitioner has offered no "clear and convincing evidence" and unacceptable conclusory statements in its petition on the issue of fraud. *See* [Petition for Cancellation, ¶ 13]. Therefore, Petitioner believes standing is the

only critical issue that that Petitioner's alleged fraud claim "turns on" in this proceeding with sufficiency of the evidence and sufficiency of the pleadings as secondary issues.

5. In the present Motion for Sanctions, Registrant highlights the discovery issues between the parties leading to the Board's Order of October 14, 2008. *See* [Motion for Sanctions, ¶¶ 3-8]. Registrant fails to see the purpose of this "history" of events provided by Petitioner since each and every issue rehashed by Petitioner has been adjudicated by the Board and is completely irrelevant to any adjudication of this Motion for Sanctions. In any case, it is clear that Registrant believed in good faith that its initial supplemental response to Petitioner's Second Set of Interrogatories No. 5 was a "meaningful response" to the subject interrogatory. Since the Board disagreed with Registrant and decided the issue otherwise, Registrant completely complied with the Order and timely filed its second supplemental response to the interrogatory. *See* [Ex. F to Petitioner's Motion for Sanctions]. The answer to the interrogatory was an unequivocal "yes," and at this time, the only issues necessitating further discussion are the manufactured issue found in the present motion and the issues brought put forth in Registrant's Motion for Summary Judgment.

6. As discussed extensively in Registrant's prior responses to discovery motions, Registrant believes that Petitioner's various motions and requests in this Board proceeding have been made for the purpose of delay and creation of unnecessary expense to Registrant. Even though Registrant has properly responded to three sets of interrogatories in this proceeding (including two supplemental sets of interrogatories), it is only now that Petitioner objects to any a Verification contained therein. *See* [Exhibit A, Previous Verifications of Registrant]. Nevertheless, Registrant must now incur additional expenses in defending Petitioner's Motion for Sanctions.

7. Registrant believes it is clear that Petitioner has waived its right to object to any alleged deficiencies in Registrant's Verification to its Second Supplemental Response to Interrogatories by failing to bring this procedural objection up after any of the previous verifications that contain the exact same language were served. *See* [Ex. F to Petitioner's Motion for Sanctions]; [Ex. A]. Indeed, Petitioner has, up to this point, filed two Motions to Compel (on March 7, 2007 and November 30, 2007) and one Rule 56(f) Motion (on December 21, 2007) without bringing up any alleged deficiencies related to the verifications of Registrant. That would have been the appropriate time to bring up such issues. It is clear that a party may waive an objection by failing to raise the objection at the appropriate time. *See* TBMP §707.04 (explaining various instances when a party waives the right to object to procedural deficiencies if the ground for objection is one that could have been cured if raised properly).

8. Furthermore, not once has Registrant received a phone call, or any other correspondence, related to the alleged deficiency in Registrant's verification. This is, of course, the first time Registrant has been made aware of any issue with its verification. When a discovery dispute arises, Petitioner is required under TBMP §523.02 to provide "a written statement from the moving party that such party or its attorney has made a good faith effort, by conference or correspondence, to resolve with the other party or its attorney the issues presented in the motion, and has been unable to reach agreement." The rule is clearly in place to eliminate the need to adjudicate issues that could have been solved without wasting the Board's time and resources. To try and circumvent this requirement via a Motion for Sanctions is completely improper.

9. Registrant further adds that Petitioner has not met its burden of proving that a deficiency exists in its Verification. The Petitioner states that Registrant's Verification was not made

"under oath," but does not submit a standard for determining the requirements for meeting the standard. Is it use of the word "under oath?" If that is the case, even Petitioner's Verifications do not meet the standard. *See* [Ex. B, Verification of Petitioner]. Registrant's verifications have consistently used language that Registrant "declares to the best of his knowledge, information and belief, the foregoing answers are true and correct," that it "knows the contents" of its answers, and has "based" the answers upon the available records. *See* [Ex. F to Petitioner's Motion for Sanctions]. Registrant suggests that the only possible reason Petitioner has decided to not accept Registrant's Verification on this occasion is because Petitioner either never cared what the answer to Interrogatory No. 5 was or did not receive its preferred answer to the interrogatory.

10. Finally, it is absolutely absurd to believe that the appropriate sanction the Board should order regarding this motion is entry of judgment. TBMP §523.02 explains that "default judgment is a harsh remedy" that will not be made unless "no less drastic remedy would be effective." Clearly this is not a situation that requires such a drastic remedy. *Id.* Registrant is not, and has never, "played games" in verifying its interrogatory responses. Petitioner's argument is a red herring that has been completely manufactured by the Petitioner. In fact, if anything, Registrant believes that the Board should use its inherent authority to enter sanctions against Petitioner for making this, and other, frivolous arguments. *See for example, Giant Food, Inc. v. Standard Terry Mills, Inc.*, 229 USPQ 955 (TTAB 1986) (applicant warned that any other filing deemed frivolous would result in judgment); *see* TBMP §527.03.

CONCLUSION

Based on the foregoing, Registrant respectfully requests that the board deny both Petitioner's Motion for Sanctions. Registrant further requests that the Board grant Registrant's Motion for Summary Judgment Dismissing This Cancellation Proceeding for lack of standing in due course.

Respectfully submitted,

November 3, 2008
Date

/1811-71/
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Reg. No. 30,627
L. Jeremy Craft
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412 Main St., 7th Floor
Houston, Texas 77002
Tel: (713)224-8080
Fax: (713)223-4873

ATTORNEYS FOR REGISTRANT
NOVATECH SA

CERTIFICATE OF SERVICE

This is to certify that on this 3rd day of November 2008, a true and correct copy of the foregoing document is being sent by regular mail to the following attorney of record for the Petitioner:

Daniel G. Jarcho
Andrew J. Park
McKenna Long & Aldridge LLP
1900 K Street, N.W.
Washington, D.C. 20006
(202) 496-7500
(202) 496-7756 fax
ATTORNEYS FOR PETITIONER
BRYAN CORPORATION

/1811-71/
John S. Egbert

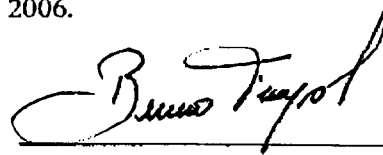
EXHIBIT A

VERIFICATION

1. FERREYROL Bruno officer for Registrant Novatech SA, hereby declare that I have read the foregoing Registrant's Response to Petitioner's Interrogatories (Nos. 1 to 34), and know the contents thereof; that said responses were prepared with the assistance and advice of counsel, upon which I have relied; that the responses set forth herein, subject to inadvertent or undiscovered errors, are based on and therefore necessarily limited by the records and information still in existence, presently recollected, and thus far discovered in the course of the preparation of the responses; that consequently, Registrant reserves the right to make any changes in its responses if it appears at any time that omissions or errors have been made therein or that more accurate information is available; and that based upon the foregoing, the undersigned declares that to the best of his knowledge, information and belief, the foregoing answers are true and correct.

DATED this 10th day of October, 2006.

By:



Title: EXECUTIVE DIRECTOR

Name: FERREYROL Bruno

Address: NOVATECH S.A.

1058 Voie Antiope

ZI ATHELIA 3

13705 LA CROTAT Cedex

FRANCE

Our File: 1811-71

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December 14, 2006

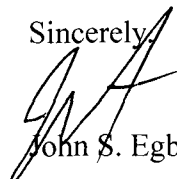
Mr. Andrew J. Park
McKenna Long & Aldridge LLP
1900 K Street, NW
Washington, D.C. 20006

Re: Our File: 1811-71
For: Trademark "STERITALC"
U.S. Registration No.: 3,093,389
Cancellation No.: 92046037

Dear Mr. Park:

Please find the attached Verification to Registrant's Second Set of Interrogatories signed by Mr. Bruno Ferreyrol of Registrant Novatech SA. If you have any questions or concerns, feel free to contact us at any time.

Sincerely,



John S. Egbert

JSE:ksw
Enclosure

VERIFICATION

I, Bruno Ferreyrol, officer for Registrant Novatech SA, hereby declare that I have read the foregoing Registrant's Response to Petitioner's Second Set of Interrogatories (Nos. 1 to 16), and know the contents thereof; that said responses were prepared with the assistance and advice of counsel, upon which I have relied; that the responses set forth herein, subject to inadvertent or undiscovered errors, are based on and therefore necessarily limited by the records and information still in existence, presently recollected, and thus far discovered in the course of the preparation of the responses; that consequently, Registrant reserves the right to make any changes in its responses if it appears at any time that omissions or errors have been made therein or that more accurate information is available; and that based upon the foregoing, the undersigned declares that to the best of his knowledge, information and belief, the foregoing answers are true and correct.

DATED this 13th day of December, 2006.

By:

Title:  Executive Director

Name: Ferreyrol, Bruno

Address: Novatech S.A.

1058 Voie Antiope - Zi Athélia 3

F - 13705 LA CIOTAT CEDEX

Our File: 1811-71

VERIFICATION

I, Bruno Ferreyrol, officer for Registrant Novatech SA, hereby declare that I have read the foregoing Registrant's Supplemental Response to Petitioner's Second Set of Interrogatories (Nos. 1 to 16), and know the contents thereof; that said responses were prepared with the assistance and advice of counsel, upon which I have relied; that the responses set forth herein, subject to inadvertent or undiscovered errors, are based on and therefore necessarily limited by the records and information still in existence, presently recollected, and thus far discovered in the course of the preparation of the responses; that consequently, Registrant reserves the right to make any changes in its responses if it appears at any time that omissions or errors have been made therein or that more accurate information is available; and that based upon the foregoing, the undersigned declares that to the best of his knowledge, information and belief, the foregoing answers are true and correct.

DATED this 31st day of OCTOBER, 2007.

By:


Title: Executive Director

Name: Ferreyrol, Bruno

Address: Novatech S.A.

1058 Voie Antiope - Zi Athélia 3

F - 13705 LA CIOTAT CEDEX

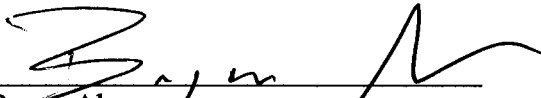
Our File: 1811-71

EXHIBIT B

VERIFICATION

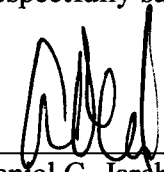
I, Bryan Abrano, certify under penalty of perjury that the foregoing Responses to Registrant's First Set of Interrogatories to Petitioner are true and correct to the best of my information, knowledge and belief.

September 27th, 2006



Bryan Abrano

Respectfully submitted,



Daniel G. Jarcho
Andrew J. Park
Attorneys for Petitioner

September 27, 2006

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Registration No.
3,093,389 Registered May 16, 2006

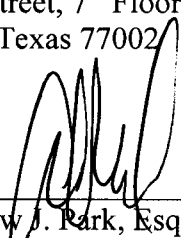
BRYAN CORPORATION,)	
)	
Petitioner,)	
)	Cancellation No. 92046037
v.)	
)	
NOVATECH SA,)	
)	
Registrant.)	

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **PETITIONER'S RESPONSE TO REGISTRANT'S
FIRST SET OF INTERROGATORIES TO PETITIONER** was served on Registrant by
mailing a true copy thereof to the attorneys of record via UPS addressed as follows:

John S. Egbert, Esq.
Egbert Law Offices
State National Building
412 Main Street, 7th Floor
Houston, Texas 77002

this 27th day of September, 2006.



Andrew J. Park, Esq.
Attorney for Bryan Corporation, Petitioner

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(202) 496-7756 fax